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No. 79-6779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER LITTLE,

Appellant,

v.

GLORIA STREATER,

Appellee.

ON APPEAL FROM THE APPELLATE SESSION OF THE SUPERIOR COURT OF CONNECTICUT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CONNECTICUT CIVIL LIBERTIES UNION *AMICI CURIAE*

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INTEREST OF AMICI */

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members dedicated to protecting the fundamental rights of the people of the United States. Central among those rights is the right of due process of law, the embodiment of our constitutional commitment to justice through procedural fairness. Accordingly, the ACLU has participated in numerous cases to ensure that individuals threatened with adverse action by the government be offered the basic requirement of due process, a meaningful opportunity to be heard.

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*/ Letters of consent from both parties to the filing of this brief have been lodged with the Clerk of the Court.

In this case, as in a very few others the Court has decided in the past, it is necessary to explore the circumstances under which government must ensure due process by providing not merely an opportunity, but the means for being heard. Amici's experience in representing a variety of indigent litigants has led to our conclusion that in light of the fundamental and protected interests of the appellant at stake, the conceded relevance and probative value of the procedure sought, and the interests of the state, appellant's right to provision of the blood-type test sought is analogous to the rights of litigants recognized in such cases as Boddie v. Connecticut, 401 U.S. 371 (1971) and Griffin v. Illinois, 351 U.S. 12 (1956). Moreover, the interest of the child in-

volved -- the unrepresented, but central party to the dispute -- further buttresses appellant's claim to the procedure sought.

This case raises an extremely narrow, but extremely important question, and we submit this brief amici curiae to assist the Court in its resolution.

SUMMARY OF ARGUMENT

The question posed by this appeal is extremely narrow: where a state causes a paternity hearing to be instituted in order to gain money from the putative father, does the constitutional guarantee of due process require that the cost of concededly relevant and probably dispositive blood-type testing be borne by the state where such testing could not otherwise be conducted because of the indigency of the putative father? As

phrased here, the Court's decision would be applicable to only a small category of paternity hearings. These, like the case below, must (1) focus on a child who is both illegitimate and a recipient of public assistance, (2) be initiated by the state in order for it to gain money from the putative father, and (3) be directed against a man who is himself indigent. The procedure required in all other paternity hearings -- and all other hearings of any sort -- would remain unaffected.

Actually, the question is even narrower. This case arises in Connecticut which, by law, provides that the requested test is relevant and its results are admissible in paternity proceedings. Connecticut law also provides that the testimony of a credible putative father is not of itself sufficient to rebut the testimony of a credible mother.

Thus, in Connecticut indigent putative fathers are required by law to introduce some evidence other than their own disclaimers of paternity, but they are prevented by their indigency from introducing in evidence test results which Connecticut law deems probative, and which would confirm non-paternity with 100% accuracy in more than 90% of all cases. The testing costs are nominal, as low as $200 to $300. And since the federal government, which strongly encourages utilization of such tests, would provide 75% reimbursement, the actual cost to Connecticut would be only $50 to $75.

The question, then, is whether a state can initiate a paternity proceeding, can require the putative father to introduce evidence other than his own testimony, and can then refuse to absorb the nominal

cost of a blood-type test the state concedes is relevant, highly probative, and probably dispositive, when the putative father is indigent.

Providing blood-type testing in those circumstances would further important interests of all parties. For the innocent putative father, the test serves as his only effective defense against the state's attempt to deprive him of property and force on him a fundamental family relationship where none exists. Without the test, the putative father's opportunity to defend would be practically meaningless. For the state, such a test will frequently result in a net savings, since the costs of obtaining and enforcing a judgment will probably be greater than the payments any indigent defendant will be able to afford. (Appellant pays $2.00 per month).

For the child, the test would help assure a reliable finding of paternity, perhaps eliminating as a potential father a man whose only distinction is his indigency. And the state has an acknowledged interest and responsibility to the child to make all reasonable attempts to ensure accuracy in the determination of paternity.

The determination of paternity or non-paternity affects fundamental interests. In these circumstances, due process requires the state to adopt reasonable procedures for resolving disputed factual contentions. Under the three-part test enunciated in Mathews v. Eldridge, 424 U.S. 319 (1975), the blood-type test requested by Appellant is a reasonable procedure which Connecticut, in the circumstances of this case, is constitutionally required to provide.

ARGUMENT

I. THE HEARING BELOW, IN FORM A CIVIL SUIT BETWEEN PRIVATE PARTIES, WAS IN SUBSTANCE THE MEANS BY WHICH CONNECTICUT SOUGHT TO DEPRIVE APPELLANT OF PROPERTY.

It is indisputable that a state may not deprive an individual of property without due process. The proceeding below, in form a suit between private parties, was in reality a suit brought by the state, thus subjecting the procedures to the requirements of due process.

Under Connecticut law, determination of the paternity of an illegitimate child takes the form of a civil action. Robertson v. Apuzzo, 170 Conn. 367 (1975), 365 A.2d 824, cert. denied, 429 U.S. 852. The child's mother typically assumes the role of plaintiff, alleging some male to be its biological father. A determination of paternity is made at trial if she presents a "fair pre-

ponderance of the evidence." Terrasi v. Andrews, 3 Conn. Cir. Ct. 499, 217 A.2d 75 (1966), cert. denied, 153 Conn. 729, 214 A.2d 130, reconsideration denied, 153 Conn. 731, 214 A.2d 683.

If the illegitimate child is a recipient of public assistance, the paternity hearing remains, in form, a private civil action. However, although the suit is still officially filed in the mother's name, the State of Connecticut is the real plaintiff. The mother is powerless: she is required by state law to "disclose the name of the putative father" to the state and to "institute an action to establish the paternity of said child." Conn. Gen. Stat. §46-169(b).

After the suit is filed, the mother's cooperation is of no consequence. If she neglects or refuses to name an attorney,

the state chooses one from among its list of those willing to serve "within department requirements". Regulations of Connecticut State Agencies §17-82e-6. If she is unwilling to testify, she may be subpoenaed, Conn. Gen. Stat. §46b-162, and will not be excused from testifying, Conn. Gen. Stat. §46b-165. The state assures the protection of its interests in other ways as well. Its Attorney General is automatically made a party to the action, Conn. Gen. Stat. §46b-160, and no withdrawal or settlement can be made without his approval. Conn. Gen. Stat. §46b-170.

A finding of paternity results in recovery from the adjudged father of all expenses incurred by the state. The "lying-in" costs of mother and child and the accrued maintenance of the child are all charged to the father. Conn. Gen. Stat.

§46b-171. "[R]easonable attorney fees" -- the costs of the state-approved private attorney who represented the mother -- are also charged to him. Id. Finally, if it appears that the child will remain a recipient of public assistance, future child support will be payable by the father directly to the state. Id.

The paternity hearing below followed precisely this procedure. Gloria Streater, the mother of a child receiving public assistance, was compelled to give the state the name of a man as its putative father. 1/ A private attorney was appointed and the Attorney General filed an

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1/ See Plaintiff's Disclosure and Production, ¶59, July 20, 1980. The disclosure was made on threat of discontinuation of appellee's eligibility for public assist-

(footnote cont'd on next page)

appearance for the state. Appellant was found at trial to be the child's biological father, and was judged liable for lying-in costs, accrued maintenance, attorney fees, and future child support. Judgment and Order, October 16, 1978. None of these sums was payable to the mother or her child. Instead, appellant was ordered to send all installments of the entire judgment to the Department of Finance and Control, State of Connecticut. Id. The

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(footnote cont'd from previous page)
ance. See Appellant's "Facts Proven," ¶4, November 17, 1978, and Appellee's concurring "Counterfinding," ¶1, December 13, 1978. Oddly, neither party has noted that the use of this threat has been specifically enjoined for years. Doe v. Shapiro, 302 F.Supp. 761 (D.Conn. 1969); Doe v. Harder, 310 F.Supp. 302 (D.Conn. 1970).

state's interest and role in this nominally "private" litigation is perhaps best gauged by the assignment of an Assistant Attorney General to represent the mother here and at all other appellate proceedings in this case.

The goal and effect of the proceeding below is evident. To gain money, Connecticut compelled the mother of an illegitimate child to name a man as its biological father, forced her to serve as a nominal plaintiff in a suit against him, and then paid for and directed prosecution of that suit. Upon the determination that the man so named was the biological father, the state was awarded appellant's property.

Such enrichment is, of course, well within the power of the state. However, in order for any state to deprive a per-

son of property, it is required by the Fourteenth Amendment to exercise "due process of law".

II. BECAUSE THE HEARING BELOW WAS ALSO AN ATTEMPT BY CONNECTICUT TO IMPOSE ON APPELLANT A FUNDAMENTAL RELATIONSHIP WHICH WOULD DEPRIVE HIM OF PROTECTED LIBERTY, CONNECTICUT WAS REQUIRED BY THE DUE PROCESS CLAUSE TO TAKE REASONABLE STEPS TO DETERMINE WHETHER OR NOT THAT RELATIONSHIP EXISTS.

Even if the state had not sought a money judgment, it did seek to impose on Appellant a fundamental relationship whose existence he denied. Imposition of that relationship would deprive Appellant of constitutionally recognized liberty interests.

When the state threatens to deprive a person of a liberty interest, due process requires that he be afforded a

"hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). This hearing must be conducted "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

These guidelines, first established in cases where the state was merely adjudicating the conflicting claims of private persons, apply a fortiorari where the state itself is seeking to deprive a person of protected interests. The Court's attention has recently been focused on the formality required of such proceedings. In certain circumstances, the opportunity to cross-examine witnesses and offer evidence was found necessary, see Goldberg v. Kelly, 397 U.S. 254 (1970)(basic welfare revocation), Morrissey v. Brewer,

408 U.S. 471 (1972)(parole revocation), while in others it was not, see Mathews v. Eldridge, 424 U.S. 319 (1976)(revocation of Social Security disability benefits). Where the government official most involved might have too great an interest to decide a matter impartially, the government has been required to provide an independent person or tribunal to make the final determination. Morrissey v. Brewer, supra at 471. By contrast, where the official most involved may be considered impartial, and has relevant expertise, his determination alone may be adequate. Parham v. J. R., 442 U.S. 584 (1979)(admission to state mental hospital).

Common to all these cases has been the fact-finding role of the state. Due process does not permit the state, as it

would a private litigant, to deprive private persons of constitutionally protected interests without concern for fairness to the party it is acting against. Rather, it imposes on the state a duty, varying in strength depending on the nature of the case, to conduct an impartial study of facts relevant to the person's protected interest, and to act only in accordance with those facts. Cf. Wood v. Georgia, 370 U.S. 375, 390 (1962)(grand jury). Even where the Court has found a formal hearing unnecessary prior to a definitive deprivation of liberty or property, it has done so only because of its judgment that due process was satisfied by the extensive fact-finding procedures undertaken -- and paid for -- by the state. See, e.g., Mathews v. Eldridge,

supra, at 335-339; Parham v. J. R., supra, at 613-617; Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78, 80-82 (1978).

Connecticut has given putative fathers the protection of a formal judicial hearing. However, such protection at the point of deprivation does not always exhaust the requirements of due process. Here, where the state has assumed the unique role of raising and then deciding whether a fundamental family relationship exists, it assumes a significant responsibility for ensuring that it acts on the basis of reliable facts. This responsibility is not discharged by the single act of forcing the mother to name some man as her child's putative father. The state owes more to both the child and the putative father. Specifically, as we

demonstrate below, it must ensure that a simple, reasonably-priced, concededly relevant and frequently dispositive test be conducted.

The state's responsibility as fact-finder is paralleled by its obligation to Appellant to assure him a meaningful hearing. In this regard, the present case closely resembles Boddie v. Connecticut, 401 U.S. 371 (1971). In Boddie, the state had monopolized the means whereby private persons could voluntarily form or dissolve a marital relationship. Their interest in such a relationship was called "fundamental". Cf. United States v. Kras, 409 U.S. 434 (1973)(bankruptcy), Ortwein v. Schwab, 410 U.S. 656 (1973)(welfare). In the present case, the state has monopolized the means whereby a relationship as basic as marriage can be created

involuntarily and irrevocably. The state declares two individuals to be related by blood: to be parent and child. But the state does not merely preside over this creation of a fundamental family relationship, it actually institutes the proceeding. Appellant here is thus like the plaintiff in Boddie: he is forced by the state to rely on state court proceedings to protect his basic interests.[2/] Obviously, his opportunity to be heard must be meaningful in fact, as well as in theory.

[2/] To defend those interests Connecticut requires a putative father not only to appear in court, but also to produce evidence beyond his own testimony, even though as a practical matter, given the private nature of most sexual relationships, such evidence (other than blood-type testing) will rarely exist. See infra n.8.

Amici do not contend that the Constitution requires the state to pay for blood-typing tests in all cases of disputed paternity. In most, it is enough that the rules of evidence at the ultimate hearing allow the admission of such tests, as Connecticut's rules do. See Conn. Gen. Stat. §46b-168. However, where the putative father cannot utilize such tests because of his indigency, the state's constitutional responsibility as fact-finder and as guarantor of a meaningful hearing may require positive action on its part. To determine whether due process requires the provision of blood-type testing under these exceptional circumstances, we consider those factors that determine the requirements of due process in any context.

III. ACCORDING TO THE TEST OF MATHEWS V. ELDRIDGE, DUE PROCESS REQUIRES THAT THE REASONABLE COSTS OF BLOOD-TYPE TESTING BE BORNE BY THE STATE WHERE SUCH TESTING WOULD OTHERWISE NOT BE CONDUCTED BECAUSE OF THE INDIGENCY OF THE PUTATIVE FATHER.

Due process, this Court has long held, "is flexible and calls for such procedural protections as the particular situation demands", Morrissey v. Brewer, supra at 481.

Whether a particular procedural safeguard is constitutionally required is determined by applying the three-part test enunciated in Mathews v. Eldridge, supra at 335:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute pro-

cedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In the present case, state payment for blood-type testing is necessitated by this test under each of the three factors.[3/]

A. Both The Property And Liberty Interests Of The Putative Father Are Substantial.

The determination of biological fatherhood of an illegitimate child receiving

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[3/] Mathews was decided after Boddie v. Connecticut and its progeny. Accordingly, the Court has not expressly applied the Mathews three-part test in earlier cases deciding whether the state must provide particular litigants the means, as well as the opportunity, for particular procedures required by due process. However, the analysis in, and holdings of, those cases fit comfortably within the Mathews test.

public assistance results in the financial obligations specified in Conn. Gen. Stat. §46b-171 and reviewed in Point I, supra. The actual dollar sums flowing from those obligations are quite substantial.

Appellant was found liable for a judgment made up of "lying-in expenses" ($852.02), "accrued maintenance" extending from the day of the child's birth to the judgment ($5,790.26), and the "costs of suit plus reasonable attorney's fees" ($332.20). These sums total $6,974.48. In addition, Appellant was ordered to make payments to cover "child support" at the rate of $163.58 a month. Computed to cover the remaining fifteen and a half years of the child's minority, these payments come to $30,425.88. Appellant was thus ordered to pay a judgment of over

$37,000.00 -- all payable to the State of Connecticut. Judgment and Order, October 16, 1978.

Little of this substantial judgment was ordered payable immediately. Apparently because of Appellant's indigency, the court directed the payment of only $2.00 per month. Although this sum is minimal, the judgment itself remains payable throughout Appellant's life. It cannot be discharged in bankruptcy, 11 U.S.C. §523(a)(5), and cannot be escaped by moving to a different state, 42 U.S.C. §§651-662. If Appellant should cease to be indigent, the court can order an increase in his payments to the state. See Conn. Gen. Stat. §46b-171. Failure to meet any of the ordered payments may result in imprisonment for contempt of court. Id.

A period of up to six months of hard labor could then be served, although still without any discharge from his liability. Conn. Gen. Stat. §46b-176.

At the time of the hearing, the only practical method of demonstrating Appellant's non-paternity, i.e., the blood-type test (see Section IIIB, infra), was beyond his means. Later, when he may have the income to pay for such tests, it will be too late to do so. Res judicata has fixed his legal paternity for all time, so his new-found income can only be devoted to the discharge of the state's $37,000.00 judgment against him.

More drastic than even this deprivation of property, or the deprivation of physical liberty with which Connecticut threatens him for failure to satisfy the judgment, is the deprivation of

fundamental liberty that the judgment effects. Appellant has a constitutionally protected and fundamental interest in choosing whether to associate with others in a family. [4/] In cases as diverse as Roe v. Wade, 410 U.S. 113 (1973), Stanley v. Illinois, 405 U.S. 645 (1972), Moore v. East Cleveland, 431 U.S. 494 (1977), Zablocki v. Redhail, 434 U.S. 374 (1978), and Boddie v. Connecticut, supra, the Court has protected the right of adults to engage in, or separate themselves from, familial relationships sanctioned by state power.

[4/] Amici do not, of course, dispute that the state may impose obligations on real fathers of illegitimate children.

Connecticut has acted through its courts to impose on Appellant a familial relationship, and consequent familial obligations, which he does not choose to assume and for which he claims not to be responsible. Under this Court's cases, assuming the facts are as he alleges, he has a fundamental right not to have a father-relationship imposed on him. 5/

B. Paternity Actions Present Substantial Risks Of Erroneous Deprivations Of Liberty And Property. Blood-type Testing Would Substantially Reduce Those Risks.

Paternity hearings are plagued with "coercion, corruption, perjury and indiffer-

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5/ In United States v. Kras, 409 U.S. 434 (1973), this Court read Boddie v. Connecticut, supra, to apply only where a civil litigant's fundamental interest was at stake and where the state had monopolized resolution of disputes concerning that interest. This case plainly satisfies both those criteria. See generally, Tribe, American Constitutional Law, at 1111, 1118-1122.

ence to the rights of the individual defendant." Family Study Commission, State of Illinois, Report and Recommendations 55 (1969), as quoted in H. Krause, Illegitimacy: Law and Social Policy, 107 (1971). This sad situation results from the insufficiency of court time allotted such case, see id., and the common assumption that, where the mother's and putative father's testimony conflict, the former is in the right. See id., Kelsaw v. Green, 6 Conn. Cir. 516, 276 A.2d 909 (1971); Holmes v. McLean, 5 Conn. Cir. 476, 256 A.2d 849 (1969). Also responsible is the peculiarity of the issue being adjudicated: conception is a biological event about which ordinarily only two persons might have probative evidence. Disinterested witnesses are a rarity.

The extent of perjury and simple

ignorance manifested under these circumstances is understandable, if shocking. One study found that fully "93% of the tested parties lied in some respect...as to their sexual relationship." Arthur & Reid, "Utilizing The Lie Detector Technique To Determine The Truth In Disputed Paternity Cases," 45 J. Crim. L.C. & P.S. 213, 215 (1954), as quoted in Krause, Illegitimacy, supra at 107. Results from another study demonstrate that paternity findings are grossly inaccurate even when based on admissions of both sexual intercourse and paternity: 18% of those men who voluntarily admitted paternity were not, in fact, the fathers of the children in question. Sussman & Schatkin, "Blood Grouping Tests in Undisputed Paternity Proceedings," 164 J.A.M.A. 249-50 (1957),

as cited in Krause, Illegitimacy, supra at 108.

The problem of unreliability is especially serious when the state causes the paternity hearing to be undertaken. Forced to name a putative father, the mother may wish to protect the actual father or protect herself from retribution from him. See Poulin, "Illegitimacy and Family Privacy," 70 Northwestern U. L. Rev. 910, 923-924 (1976). Alternatively, where she simply does not know which of two or more men is the biological father, she is nevertheless constrained to name one and testify against him. See Point I, supra.

Finally, the standard of proof used in paternity hearings further aggravates the problem. Previously, when paternity was considered a criminal offense (as it was in Connecticut), it had to be demon-

strated beyond a reasonable doubt. See Krause, Illegitimacy, supra at 109. Now, usually reclassified as a civil action, the measure of proof is generally that of a "preponderance of the evidence." Id.; see supra, at 8-9.[6/] Faced with "an accusation by the woman and a denial by the defendant..., the judges feel constrained to enter a finding of paternity." Family Study Commission, supra.

In stark contrast to the unreliability of human testimony concerning paternity stands the well-developed technology of blood-type testing. Such laboratory procedures compare various genetic qualities

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[6/] Whether that low standard satisfies the requirements of due process is not at issue in this case.

of the blood of the child with that of its mother and putative father. Where the child's carries a characteristic that neither of the others' has, the putative father is absolutely excluded as the true father. See generally, Krause, Illegitimacy, supra at 123-136; works cited infra at n.7. So reliable is this method that some states require that where non-paternity is so indicated the issue of paternity must be resolved accordingly. See, e.g., Calif. Evid. Code, §895.

In 1976, a joint AMA-ABA committee issued a report recognizing the precision achieved by blood-type testing. Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Family Law Quarterly 247 (1976). The report also set forth a battery of seven

tests recommended "for routine use". Id. at 254. Statistically, more than nine out of ten men -- 91 to 93% -- would be definitely excluded through its application. Id. at 257. 7/

Blood-type testing thus introduces the element of scientific precision into an adjudicatory context in which inaccuracy is common. Instead of perjury or the unreliable testimony of interested parties, it offers disinterested evidence. And

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7/ Further literature attesting to the accuracy of blood-type testing includes: Terasaki, "Resolution by HLA Testing of 1,0^0 Paternity Cases Not Excluded By ABO Testing," 16 J.Fam.L. 543 (1978); L. Sussman, Paternity Testing by Blood Grouping (2d ed. 1976); and Ellman and Kaye, "Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?" 54 N.Y.U.L.Rev. 1131 (1979). A report of results surpassing 99% exclusion appears in Henningsen, "Some Aspects of Blood Grouping in Cases of Disputed Paternity in Denmark," 2 Methods of Forensic Science 209, 224-25 (1963).

such evidence corrects an evidentiary imbalance. Where, as in Connecticut, the state's burden of proof is satisfied by nothing more than the mother's allegation and testimony, even if disputed by the putative father, the father is in need of some evidence beyond his denial to rebut her claim. [8/] This -- if he is indeed innocent of the charges -- can be supplied by blood-type tests with 100% accuracy in more than 90% of the cases.

[8/] Connecticut provides, as a matter of law, that the testimony of a putative father is not, of itself, sufficient to rebut the mother's accusations. See Holmes v. McLean, 5 Conn. Cir. 476, 256 A.2d 849 (1969); Williams v. Gray, 4 Conn. Cir. 326, 231 A.2d 285 (1967). Testimony concerning earlier accusations is admissible to prove the truth of those accusations under a statutory exception to the usual hearsay rules. See Conn. Gen. Stat. §46b-160.

C. Blood-Type Testing Would Further Important State Interests, At A Nominal Cost, And With No Additional Administrative Burdens.

State-paid blood-type tests where the putative father is indigent will often save the state money, and will facilitate accuracy in determining the parentage of the child, its ward.

Connecticut presumably resists payment for blood-type testing for indigent putative fathers because of the cost involved. Hospitals surveyed in an H.E.W.-sponsored study charge between $200 and $300 for procedures evaluating the seven genetic traits recommended by the AMA-ABA Guidelines. [9/] See H.E.W. Office of Child

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[9/] As we demonstrate infra, the federal government would pay 75% of the cost of all blood-type tests. The cost to Connecticut would thus be about $50 to $75.

Support Enforcement, Blood Testing to Establish Paternity (1977), Table XI. However, to consider only these immediate expenses would be short-sighted. The state incurs other expenses when it does not pay for these tests, and these can be substantial. For example, failure to provide such tests necessarily results in a greater percentage of defendants being adjudged to be biological fathers. (At least some of those for whom the tests would exclude paternity would be incorrectly found to be the children's fathers.) A greater number of adjudged fathers would result in a greater number of monetary judgments, and thus, apparently, more income for the state. However, unlike non-indigant putative fathers of AFDC children generally -- as to whom Congress has found that the reimburse-

ments received outweigh the administrative costs of recoupment -- all of these adjudged fathers are indigent. Accordingly, although judgment against them might be considerable, actual recovery will be negligible. Appellant, for example, pays Connecticut only $2 per month of his $37,000 judgment.

A few of these indigent adjudged fathers might someday earn enough money to generate income for the state. However, the likelihood that the state would discover such new-found wealth, then gain a new court order increasing payments under the judgment, and then actually receive these monies is doubtful. By contrast, the effort to obtain and enforce paternity judgments always entails substantial administrative and judicial costs.

The state must monitor the income of all indigent adjudged fathers, seek new court orders, and attempt to collect the greater payments.

By supplying blood-type tests to indigent putative fathers, the state would discover that some of them are not, in fact, the fathers of the children in question. This discovery would result in several financial benefits. Dismissal of the paternity action would save the state the further costs incurred by the private attorney prosecuting the case and by the assistant attorney general representing the state's interests. State court time would likewise be reduced. The discovery of non-paternity would eliminate the expenses incurred in the collection of such nominal sums as $2 a month.

Finally, the discovery of non-paternity might even enable the state to elicit from the mother the name of the true father, who might not be indigent.

The state also has a non-financial interest and "responsibility" to "make all reasonable attempts" to determine paternity. Connecticut's own regulations acknowledge the value Connecticut places on assisting illegitimate children to determine their true parentage:

> It is the responsibility and obligation of the State on behalf of the concerned child to make all reasonable attempts to determine the identity of the child's father in all cases where paternity has not been legally established and to provide financial assistance for the establishment of paternity for both AFDC and non-AFDC cases in accordance with the established procedures.
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> Sec. 17-82e-4.

It is hard to square the actual practice of Connecticut with this avowal of "responsibility and obligation...on behalf of the concerned child." Certainly its sole effort, the coercion of the mother to name some man as father, does not constitute "all reasonable attempts to determine the identification of the child's father." 10/ Plainly, it would be "reasonable" to "attempt" to determine paternity through use of blood-type

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10/ Appellant apparently did not argue that this regulation, which would seem to embody an obligation "for the establishment of paternity", not merely for the institution of paternity proceedings, required the state to pay for the blood test as a matter of state law. Nor did the Connecticut courts raise the point sua sponte. In light of Ferro v. Morgan, 35 Conn.Supp. 689, cert. denied 177 Conn. 753, 399 A.2d 526 (1979), any such effort would likely have been fruitless.

tests. 11/ As to the short-run costs involved in such testing, the regulations are clear: the state has an "obligation" to "provide financial assistance" in its attempt to determine paternity.

Connecticut's behavior is even less comprehensible in light of the federal statute under which the state receives 75% of its child support monies. 42 U.S.C. §§651-662.

11/ The reasonableness of state-supported blood-type testing for indigent defendants in paternity actions is demonstrated by the number of states that expressly allow (or allow by more general rule) blood-type testing costs to be charged to the state. See Jurisdictional Statement at 7-9 & n.7. Apparently, North Carolina is the only state beside Connecticut obligating the requesting party to pay for blood-type testing in advance.

The participating state must "undertake...to establish the paternity" of an illegitimate child receiving public assistance. 42 U.S.C. §654(4)(A). 12/ Even those illegitimate children who are ineligible for government aid enjoy access to the state's "paternity determination services." 42 U.S.C. §654(6).

The legislative history accompanying this federal statute makes clear the

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12/ So far as amici are aware, Appellant has not argued that the federal statute of its own force requires the state to provide blood-type testing to indigent paternity defendants. Because the plain language of the statute permits -- if not compels -- such a construction, this Court could rest its decision on this statutory ground. Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1935) (Brandeis, J., concurring).

policy behind requiring such services:

> In taking the position that a child born out of wedlock has a right to have its paternity ascertained in a fair and efficient manner, the [Senate Finance C]ommittee acknowledges that legislation must recognize the interest primarily at stake in the paternity action to be that of the child. Since the child cannot act on his own behalf in the short time after his birth when there is hope of finding its father, the Committee feels a mechanism should be provided to ascertain the child's paternity whenever it seems that this would both be possible and in the child's best interest.
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> 1974 U.S. Code Cong. and Adm. News 8133, 8155.

The report goes on to note that "paternity can be ascertained with reasonable assurance, particularly through the use of scientifically conducted blood typing." Id.

Although the regulations issued under the statute do not explicitly require blood-type testing, they do encourage the practice through a provision that explicitly affords blood-type testing requested by state officials the usual 75% federal contribution to state child support programs. 45 C.F.R. §304.20(b)(2)(i)(B). Connecticut's inexplicable refusal to make use of this federally sanctioned method of establishing paternity constitutes a curious denial of its interests, both as acknowledged by its regulations and as specified by national child-support policy.

Finally, Connecticut has not claimed that state provision of blood-type testing would entail significant administrative burdens. Nor could it in light of the statutory recognition of the value of

such testing, its common use by non-indigent defendants, and the existence of a state-prepared list of approved laboratories.[13/] Indeed, blood-type testing for indigent defendants would dispositively eliminate many named innocent putative fathers against whom the state would be otherwise required to institute proceedings under its federally-approved plan, thereby substantially reducing the state's administrative burden.

13/ All states that participate in the federal child support program must compile a list of laboratories conducting "legally and medically acceptable" blood-type tests. This list must be made available to state authorities, the courts, and to private persons. 45 C.F.R. §303.5(c).

CONCLUSION

Amici submit that application of the *Mathews v. Eldridge* test mandates state provision of blood-type tests to indigent defendants in state-instituted paternity proceedings. Accordingly, for the foregoing reasons, the judgment of the Appellate Session of the Superior Court should be reversed, and the case remanded for further proceedings consistent with the opinion of the Court.

Respectfully submitted,

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